Citation: *S. N. v. Minister of Employment and Social Development,* 2015 SSTAD 753

Appeal No. AD-15-132

BETWEEN:

S. N.

Applicant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division –Extension of Time and Leave to Appeal Decision

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SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: June 18, 2015

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated January 14, 2015 (the "Leave Application"). The General Division dismissed her application for a disability pension, as it found that her disability was neither "severe" nor "prolonged" for the purposes of the *Canada Pension Plan*, by her minimum qualifying period of December 31, 2007. The Applicant submits that the General Division erred in law in making its decision and that it also based its decision on erroneous findings of fact. To succeed on this leave application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[3] Counsel for the Applicant submits that the General Division made the following errors, that it:

(a) erred in law in equating the Applicant's volunteer work in 2009 with capacity regularly of pursuing any substantially gainful employment, and

(b) based its decision on an erroneous finding of fact without regard for the material before it. In particular, the General Division erred in finding that, despite some setbacks, the Applicant's level of activity and participation in a work hardening program demonstrated that she held the capacity regularly of pursuing any substantially gainful employment in 2007 or before the minimum qualifying period.

[4] Counsel submits that the decision of the General Division is unreasonable, given the evidence before it. Counsel summarized some of the evidence, including her efforts at rehabilitation and treatment.

[5] The Respondent has not filed any written submissions.

ANALYSIS

[6] Some arguable ground upon which the proposed appeal might succeed is required for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an application has a reasonable chance of success: *Canada (Minister of Human Resources Development) v. Hogervorst*, 2007 FCA 41 and *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[7] Subsection 58(1) of the *Department of Employment and Social Development Act* ("DESDA") sets out the grounds of appeal as being limited to the following:

> (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or
>
> (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[8] The reasons for appeal should fall into one of the enumerated grounds of appeal under subsection 58(1) of the DESDA. Ultimately, I need to be satisfied that the appeal has a reasonable chance of success, before I can grant leave.

(a) Allegation of error of law

[9] The evidence regarding the Applicant's volunteer work is at paragraph 27 of the decision of the General Division, which reads:

> [27] The Appellant attended her volunteer placement for an orientation session and for two hour sessions on two other days in early June 2009. She reported that she liked the work but that her legs and feet were swollen. She testified at the hearing that she continued this volunteer placement for a time, and that she was able to complete tasks such as filing, photocopying and typing. She had a hard time with pain after she developed reflex sympathetic dystrophy (RSD) in her right foot.

[10] And, at paragraph 46 of its reasons, the General Division wrote:

> [46] The determination of the severity of a disability is not based on a person's inability to perform her regular job, but rather on her inability to perform any work. The Appellant's activities between January 2005 and December 2007 suggest that she may have been able to succeed at some type of work. She had clerical and administrative skills and computer literacy, all of which would have been transferable to a flexible job that accommodated the Appellant's health issues. **The Appellant's volunteer placement in mid-2009 is further evidence that she retained the capacity to work and was well on the way to recovery at that time.** (My emphasis)

[11] Counsel submits that the General Division erred in law in equating the Applicant's volunteer work in 2009 with capacity regularly of pursuing any substantially gainful employment.

[12] Can evidence of volunteer work ever be seen as showing functionality and capacity, or must one always accept that volunteer work can never truly reflect any capacity on the part of an applicant? I am of the view that the issue of the General Division equating volunteer work with the capacity regularly of pursuing any substantially gainful employment raises an arguable case. There may be a broader issue here as to what extent volunteer work might be seen to reflect capacity regularly of pursuing any substantially gainful employment.

(b) Allegation of erroneous finding of fact

[13] For the purposes of this leave application, I do not require that there be an actual demonstrated error on the part of the General Division, but in assessing this ground of appeal raised by the Applicant, the Applicant needs to satisfy me that the General Division made the finding which the Applicant submits the General Division made.

[14] The Applicant alleges that the General Division based its decision on an erroneous finding of fact without regard for the material before it, in finding that her level of activity and participation in a work hardening program demonstrated that she held the capacity regularly of pursuing any substantially gainful employment in 2007 or before the minimum qualifying period.

[15] At paragraph 48 of its decision, the General Division found that the Applicant was "reasonably active and functional, and was expected to participate in work- hardening". There

is a slight difference between Counsel's allegations and the findings made by the General Division, in that the Applicant alleges that the General Division found her to be participating in a work hardening program, whereas the General Division found that she was expected to participate in such a program.

[16] The letter dated May 12, 2009 from Matrix Health Services, to the disability insurer indicates the Applicant would be in a position to start a work hardening program followed by a return to full-time employment.

[17] Matrix's letter dated December 10, 2009 to the disability insurer indicates that it would be at least three months before they could consider starting the Applicant on a work hardening program (GT1-281/363) and the letter dated November 25, 2010 indicates that if a decision were made to proceed with further rehabilitation, a three- month vigorous activation was felt to be realistic, taking into account a number of factors (GT1-516).

[18] On September 9, 2011, the Applicant wrote that she was planning a work hardening program for September 2011, but it had since been cancelled as she fell again in May 2011 and tore the ligament in her right knee (GT1-17).

[19] Although the Applicant did not commence or actually participate in the work hardening program, there is evidence in the hearing file that was before the General Division that indicates the Applicant had been expected and would have likely participated in the work hardening program by September 2011 (after it had been delayed from a previous starting date), but was cancelled and delayed yet again as she had fallen in May 2011.

[20] As there was an evidentiary basis upon which the finding that she was active and expected to participate in a work hardening program was made, it cannot be said that the General Division made an erroneous finding of fact without regard to the material before it. It was open to the General Division to draw conclusions from the evidence, provided that that evidence was before it. I am not satisfied that there is a reasonable chance of success on this ground of appeal.

(c) Counsel's summary of evidence and reasonableness of the decision of the General Division

[21] The summary of the evidence does not fall into any of the enumerated grounds of appeal under subsection 58(1) of the DESDA and therefore is of no relevance to the leave application, other than for the purposes of providing some factual background.

[22] Similarly, the submissions regarding the reasonableness of the decision are not relevant to a leave application and would have been best left to an appeal.

[23] To be clear, the leave application is not an opportunity for the Appeal Division to re-hear and reassess the evidence or any submissions before the General Division. It is not a re-hearing of the merits of the claim.

APPEAL

[24] Issues which the parties may wish to address on appeal include the following:

(a) What level of deference does the Appeal Division owe to the General Division?

(b) Based on the ground upon which leave has been granted, did the General Division commit the alleged error of law?

(c) Based on the ground upon which leave has been granted, what is the applicable standard of review and what are the appropriate remedies, if any?

[25] I invite the parties to make submissions also in respect of the form of hearing (i.e. whether it should be done by teleconference, videoconference, other means of telecommunication, in-person or by written questions and answers). If a party requests a hearing other than by written questions and answers, I invite that party to provide a preliminary time estimate for submissions.

CONCLUSION

[26] The Applicant has satisfied me that there is a reasonable chance of success on one of the grounds raised by her counsel, and as such, leave to appeal is granted.

[27] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Janet Lew
Member, Appeal Division